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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1211.~~ 722

JAMES A. BRIGGS, EXECUTOR OF C. M. BRIGGS, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 11, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 29, 1890.

1 In the Court of Claims.

JAMES A. BRIGGS, Executor of C. M. Briggs, Plaintiff,
vs.
UNITED STATES. } 16262.

I.—*Petition. Filed June* 11, 1888.

The claimant, James A Briggs, says that he was on the 15th day of July, 1875, appointed executor of the estate of C. M. Briggs, who departed this life intestate, a citizen and resident of the county of Jefferson, in the State of Kentucky, by the county court of Jefferson county, in the State aforesaid; that he accepted said trust and duly qualified by taking the oaths of office and executing bond. Certified copies of the order of appointment, bond, and will of said Briggs are filed herewith as part hereof, marked Exhibit "A."

He says that the Congress of the United States passed a bill, which was approved by the President thereof on the 4th day of June, 1888, in substance as follows:

2 An act for the relief of the estate of C. M. Briggs, deceased.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims is hereby given, subject to the proviso hereinafter mentioned, like jurisdiction to hear and determine the claim of the legal representatives of C. M. Briggs, deceased, for the proceeds of four hundred and fifty-five bales of cotton, now in the Treasury of the United States, alleged to have been owned, in whole or in part, by said Briggs, as is given to said court by the acts of March twelfth, eighteen hundred and sixty-three, and July second, eighteen hundred and sixty-four, upon petition to be filed in said court at any time within two years from the passage of this act, any statute of limitations to the contrary notwithstanding: Provided, however, that unless the said court shall, on a preliminary inquiry, find that said Briggs was in fact loyal to the United States Government, and that the assignment to him hereinafter mentioned was *bona fide*, the court shall not have jurisdiction of the case, and the same shall, without further proceedings, be dismissed: And provided further, that if the court shall find that the alleged assignment from one Morehead to said Briggs, of date April eighteenth, eighteen hundred and sixty-two, under which said Briggs claimed said cotton, was intended only as security to said Briggs for indebtedness, and against contingent liabilities assumed by him for said Morehead, judgment shall be rendered for such portion of the proceeds of said cotton as will satisfy the debts and claims of said Briggs, to secure which said assignment was given, provided said judgment shall not be paid out of the general fund in the Treasury arising from the sale of captured and abandoned property, but shall be paid out of the special fund charged to and accounted for by Captain G. L. Fort, assistant quartermaster at Memphis, arising from the sale of the two thousand two hundred

and nine bales of cotton, received by him, with which claimant's cotton was intermingled, said claimant to receive only the proportion which his cotton bears to the net proceeds accounted for by said Fort.

3 The claimant further says that on the day of 18th day of April, 1862, one C. S. Morehead executed to C. M. Briggs a bill of sale or assignment in substance as follows:

For and in consideration of money loaned and advanced heretofore by C. M. Briggs and further valuable considerations by way of suretyship for me by said Briggs I hereby sell and transfer to said C. M. Briggs all of the cotton on my two plantations in Mississippi, near Egg's Point and Greenville. Said cotton so sold embraces all that I may have, baled and unbaled, gathered and ungathered. This is intended to cover all cotton that I have now or may have this year on said two plantations, supposed to be about two thousand bales.

C. S. MOREHEAD.

April 18, 1862.

Which was delivered to said Briggs the day of its execution, on which day said Morehead sold to him all of the cotton on his (Morehead's) two plantations in Mississippi, near Egg's Point and Greenville, embracing all that he might have, baled and unbaled, gathered and ungathered, covering all that he had then or might have during the year 1862, supposed to be about two thousand bales.

Which said sale was in consideration of money loaned and advanced before that time by Briggs to Morehead and suretyship for him by Briggs.

He says that said sale was made in good faith, and Briggs became thereby and was thereafter the owner of said cotton.

That C. M. Briggs was at that time and ever afterwards to the day of his death in fact, truth, and deed loyal to the United States Government and did consistently adhere to the same, giving no aid or comfort to persons engaged in rebellion.

That on or about the 20th day of March, 1863, Captain

4 E. D. Osband, of the 4th Illinois Cavalry, in command of an expedition, under orders from General U. S. Grant, seized about two thousand two hundred and nine bales of cotton near Worthington's landing or about that point, on the Mississippi river, and, having loaded it upon the steamer Empress, carried it to Memphis, Tennessee, where it was turned over to Capt. G. L. Fort, A. Q. M. of the U. S. A., and it was sold for about four hundred and thirty thousand dollars, and the proceeds accounted for by him and carried into the Treasury of the United States; that there was embraced in said cotton four hundred and fifty-five bales of cotton belonging to said C. M. Briggs, bought, as aforesaid, from Morehead, which cotton averaged four hundred and eighty pounds to the bale, and realized in net proceeds ninety-two thousand four hundred and fifty dollars, after deducting all expenses, and was accounted for by said Fort, A. Q. M., as aforesaid.

He says that neither said C. M. Briggs in his lifetime nor he

since his death has ever sold, transferred, or assigned in any way said claim or any part thereof, but is now sole owner of the same, and is justly entitled to recover and receive the full amount thereof, against which there are not just offsets on the part of the Government.

He therefore prays judgment for the sum of ninety-two thousand four hundred and fifty dollars, the net proceeds of his said cotton, taken and appropriated as aforesaid; and, in case the court should find that said instrument was intended only as a security to said Briggs for indebtedness and against contingent liabilities assumed by him for said Morehead, he asks that judgment be rendered for such a portion of the proceeds of said cotton as will satisfy the debts and claims of said Briggs, to secure which they find it was
5 given, which debts and claims, with the interest thereon, he alleges, will more than cover the amount aforesaid; and he asks for all other proper relief.

JAMES A. BRIGGS,
Executor, &c., C. M. Briggs, Dec'd,
By W. J. MOBERLEY, *Attorney.*

W. J. Moberley says he prepared, at the special instance and request of plaintiff, the above petition, and that the averments therein contained are true to the best of his knowledge and belief, and that plaintiff, who is absent in a distant State, would personally verify the same if personally present to act in his own behalf.

W. J. MOBERLEY.

Subscribed and sworn to before me this 11th day of June, A. D. 1888.

[SEAL.] S. A. TERRY,
Notary Public.

II.—*Amended Petition. Filed February* 11, 1889.

Comes the plaintiff by favor of the court and amends his original petition herein, and says that since he filed his original petition in this cause the Treasury Department, in reply to a call of this court, has filed a more complete statement concerning the cotton captured by Capt. E. D. Osband in Washington county, State of Mississippi, in March, 1863, and which was brought to Memphis on the steamer Empress and sold by Capt. G. L. Fort, A. Q. M., U. S. vols.; that from said statement it appears that of the said cotton there was sold in April, 1863, after the same had been rebaled, twenty-one hundred and eleven bales, and the net proceeds from the sale of same, amounting to four hundred and twenty-two thousand one hundred and twenty-five dollars and seventy cents ($422,125.70), were by said Fort taken up on his official returns and accounted for as funds belonging to the quartermaster's department.

6 Plaintiff says that of said net proceeds of sale of said cotton so accounted for by said Fort there at present remains in the Treasury, after deducting all payments properly chargeable to

the same and which have been from time to time paid out to various claimants on judgments of this court, the sum of one hundred and thirty-eight thousand five hundred and twenty-three dollars and $\frac{92}{100}$, being the net proceeds of six hundred and twenty-one bales of said cotton, for which no claim or claims has ever been made on which judgment has been rendered or payment or payments made from the Treasury, and that of this said sum, $138,523.92, plaintiff is entitled to recover his *pro rata* share, corresponding to his four hundred and fifty-five bales, amounting in the aggregate to one hundred and one thousand seven hundred and ninety-four dollars and fifty-seven cents. Wherefore plaintiff prays judgment for the sum of $101,794.57 and for such other relief as is prayed in his original petition and which the court in its discretion may deem proper to accord.

JAMES A. BRIGGS,
Executor, &c.,
By W. J. MOBERLEY, *Attorney.*

W. J. Moberley says he prepared at plaintiff's instance the above amended petition, and that the averments therein contained are true to the best of his belief, and that the plaintiff, who is absent in Kentucky, would verify same if personally present to act in his own behalf.

W. J. MOBERLEY.

Sworn to and subscribed before me this — day of February, 1889. Witness my hand and seal.

[SEAL.] JOHN RANDOLPH,
Ass't Cl'k C't of C.

7 III.—*Traverse. Filed March* 14, 1889.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government the Attorney General, in pursuance of the statutes in such case provided, denies the said allegations and asks judgment accordingly.

ROBERT A. HOWARD,
Ass't Att'y General.

8 IV.—*Facts Found on Preliminary Inquiry by the Court April* 15, 1889.

At a Court of Claims held in the city of Washington on the 15th day of April, 1889, the court in this case filed the following findings, to wit:

April 8, 1889.—This case came on to be heard on a preliminary inquiry as to the loyalty of C. M. Briggs and as to the *bona fide* character of the assignment to him by C. S. Morehead.

Hon. Phil. B. Thompson, Jr., and W. J. Moberley, Esq., appeared for the claimant, and the Attorney General, by Robert A. Howard, Assistant Attorney General, for the defendants.

The case having been heard upon these preliminary questions, the court from the evidence finds that C. M. Briggs "was in fact loyal to the United States Government," and that the assignment to him by C. S. Morehead, dated April 18, 1862, "was *bona fide*."

By the court.

9 V.—*Findings of Fact and Conclusion of Law. Filed February 3, 1890.*

This case having been heard before the court upon the evidence, the following facts are found:

I.

James A. Briggs is the executor of the last will and testament, under the laws of Kentucky, of Charles M. Briggs, deceased.

On the 18th day of April, 1862, Charles S. Morehead was, as he had been many years, a resident and citizen of said State of Kentucky, and was then the owner of two plantations in Washington county, State of Mississippi, near Egg's Point and Greenville, in said State.

He had been Governor of said State and was, before the commencement of the war, engaged in the practice of law with the said C. M. Briggs as his partner.

II.

After the commencement of the war and before said 18th day of April, 1862, the said Morehead was arrested by the officers of the United States because of his sympathy with the Confederate cause and confined in Fort Warren for a considerable period of time, until February, 1862, when he took the oath of allegiance and was released. That said Charles M. Briggs was loyal to the Government of the United States throughout the war.

III.

On the 18th day of April, 1862, the said Morehead executed and delivered to the said Charles M. Briggs the following instrument in writing:

For and in consideration of money loaned and advanced heretofore by C. M. Briggs and further valuable consideration by way of suretyship for me by said Briggs I hereby sell and transfer to said C. M. Briggs all of the cotton on my two plantations in Mississippi, near Egg's Point and Greenville. Said cotton so sold embraces all that I have, baled and unbaled, gathered and ungathered. This is in-

tended to cover all cotton that I have now or may have this year on said two plantations, supposed to be about 2,000 bales.

C. S. MOREHEAD.

April 18, 1862.

10 Said instrument was executed and delivered when both parties were citizens and residents of the State of Kentucky, was founded upon a valuable consideration, and was *bona fide* between the parties.

IV.

Said Morehead, while a citizen of Kentucky, in the year 1861, after the commencement of the war, was for a short time at said plantation in Mississippi, late in the spring or early in the summer. He left in charge of said plantations two agents, who superintended the raising of cotton and who had the general direction of the affairs of the plantations in the years 1861, 1862, and 1863. The claimant's son, who had charge of one of the plantations, sold cotton grown on said plantations in those years for the purpose of raising means to carry on the plantations. Some of said sales were made to the agent of the Confederate Government. It does not appear whether or not the said Morehead gave any directions to said agents as to the disposition of the crops for said periods. It does not appear whether or not he had any communication with his said agents in the years 1862 and 1863.

V.

At the time of the execution of said instrument there was no cotton on said plantations belonging to said Morehead which afterwards came into the possession of the United States. The crops raised before said time were, by the acts of one of the said agents, as aforesaid, disposed of to the agent of the Confederate Government or to other parties, and all the cotton hereinafter mentioned was raised after the execution of said instrument.

VI.

In the year 1862 the said agents in the control of the said plantations for said Morehead raised a crop of cotton on said plantations, a portion of which, in December, 1862, or January, 1863, was, by the direction of said agent, hauled to "Wilson's Burn," a place then and there used as a place for the storage of cotton belonging to or intended to be sold to the Confederate Government, and which was also used for the storage of the cotton of individuals. Said cotton was marked C. S. A. by said agent in order to save it from destruction by Confederate soldiers. It was not so marked by the direction of said Morehead.

While said cotton was so placed, as aforesaid, in the month of March, 1863, three hundred and eighty bales of it *was* taken possession of by Capt. E. D. Osband, acting under orders of General Grant, taken to Worthington's landing, on the Mississippi river, where it was intermingled with other cotton taken about the same time from adjacent plantations and shipped to Memphis, Tenn.,

where it was turned over to Capt. G. L. Fort, assistant quartermaster, United States volunteers, by whom it was sold and the proceeds taken up on his returns as assistant quartermaster and accounted for as funds of the quartermaster's department.

11 VII.

That the total amount of cotton so received and sold by Capt. G. L. Fort, and of which claimant's formed a part, was 2,180 bales and this amount, after rebaling and prior to sale, was reduced to 2,111 bales, which latter was the total number of bales of said cotton sold and accounted for by said Fort, and the total amount of net proceeds derived from the sale of said 2,111 bales of cotton was $422,125.70.

VIII.

Of the total amount of net proceeds, $422,125.70, of the cotton received by the steamer Empress, by Captain Fort, and by him sold as 2,111 bales, there have been paid to the owners on judgments of the Court of Claims the following amounts:

To Sam. Worthington's administrator	$165,673 42
To W. W. Worthington	45,177 00
To Evelina M. Hammett	6,158 35
To Nannette Sweitzer	8,173 81
To Robert M. and Stephen A. Douglass	58,419 20

Total amount of net proceeds, $422,125.70; whole number of bales, 2,111, accounted for by Captain Fort; amount of cotton received as aforesaid from the plantations of Morehead, 455 bales. The proportion which said 455 bales bears to whole number of bales makes the proceeds of said 455 bales $91,000.

IX.

It does not appear what was the state of indebtedness between Morehead and Briggs at the time of the execution of the instrument. Briggs had paid $8,000 or $10,000 bank debts for Morehead from time to time, and Morehead had collected Briggs's portion of a fee, amounting to $5,000, and was in the habit of borrowing money from him during the continuance of the law partnership, which existed before and up to the commencement of the war. It does not appear that any definite settlement was made between them.

Conclusion of Law.

Upon the foregoing facts the court determines, as a conclusion of law, that the claimant has no cause of action, and his petition must be dismissed.

VI.—*Opinion of the Court.*

RICHARDSON, *Ch. J.*, delivered the opinion of the court:

Jurisdiction of this case is conferred upon the court by the following act of Congress:

An act for the relief of the estate of C. M. Briggs, deceased.

Be it enacted, etc., That the Court of Claims is hereby given, subject to the proviso hereinafter mentioned, like jurisdiction to hear and determine the claim of the legal representatives of C. M. Briggs, deceased, for the proceeds of four hundred and fifty-five bales of cotton, now in the Treasury of the United States, alleged to have been owned, in whole or part, by said Briggs, as is given to said court by the acts of March twelfth, eighteen hundred and sixty-three, and July second, eighteen hundred and sixty-four, upon petition to be filed in said court at any time within two years from the passage of this act, any statute of limitations to the contrary notwithstanding:

Provided, however, that unless the said court shall, on a preliminary inquiry, find that said Briggs was in fact loyal to the United
12 States Government, and that the assignment to him hereinafter mentioned was *bona fide*, the court shall not have jurisdiction of the case, and the same shall, without further proceedings, be dismissed:

And provided further, that if the court shall find that the alleged assignment from one Morehead to said Briggs, of date April eighteenth, eighteen hundred and sixty-two, under which said Briggs claimed said cotton, was intended only as security to said Briggs for indebtedness and against contingent liabilities assumed by him for said Morehead, judgment shall be rendered for such portion of the proceeds of said cotton as will satisfy the debts and claims of said Briggs, to secure which said assignment was given:

Provided said judgment shall not be paid out of the general fund in the Treasury arising from the sale of captured and abandoned property, but shall be paid out of the special fund charged to and accounted for by Captain G. L. Fort, assistant quartermaster at Memphis, arising from the sale of the two thousand two hundred and nine bales of cotton received by him, with which claimant's cotton was intermingled, said claimant to receive only the proportion which his cotton bears to the net proceeds accounted for by said Fort. (June 4, 1888, ch. 348, Stat. L., 1075.)

The act revives in favor of the claimant the jurisdiction given to the court by the abandoned or captured property act of March 13, 1863 (12 Stat. L., 820), removing the limitation of time for bringing actions which had long since expired, and allowing the claimant two years from the passage of the latter act in which to bring suit in this court.

The only other departures from the terms of the abandoned or captured property act are that the claimant is required to prove that the assignment under which he claims title to the cotton in question was *bona fide;* that if the court finds the assignment was intended only as security for indebtedness and certain contingent liabilities the measure of damages shall be only sufficient to satisfy the debts and claims to secure which the assignment was given, and that any judgment recovered shall be payable not out of general proceeds of the abandoned or captured property, but out of a designated part of the same.

In all other respects the action is subject to the provisions of the act of 1863 and its amendments, as interpreted and construed by the courts.

That act, in section three, thus provides:

And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and, on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof.

In numerous decided cases under that act it has been held that the validity of the claimant's alleged title to the property at the time of seizures must be established, and that if the title had been acquired through illegal transactions in contravention of that prohibited intercourse between the sections at war with each other, which was declared by statute or contrary to public policy, such asserted title was void as against the United States, and that the claimant relying upon it was not the owner of the property and had no right to the proceeds thereof within the meaning of the abandoned or captured property act. Grossmeyer's case (9 Wall., 72); Ensley's case (6 C. Cl's R., 283), affirmed on appeal without opinion (see 9 C. Cl's R., 11); Lane's case (8 Wall., 195); Montgomery's case (15 Wall., 395); The Elgee cotton cases (22 Wall., 183); Desmare's case (93 U. S. R., 605), affirming the judgment of the Court of Claims (10 C. Cl's R., 385); Lapene's case (17 Wall., 602); Mitchell's case (21 Wall., 350); Walker's case (12 C. Cl's R., 403), affirmed (106 U. S. R., 413); Whitfield's case (92 U. S. R., 165).

13 In the present case the claimant's testator derived his alleged title to the cotton by assignment from one Morehead in the following terms:

For and in consideration of money loaned and advanced heretofore by C. M. Briggs and further valuable considerations by way of suretyship for me by said Briggs I hereby sell and transfer to said C. M. Briggs all of the cotton on my two plantations in Mississippi, near Egg's Point and Greenville. Said cotton so sold embraces all that I may have, baled and unbaled, gathered and ungathered. This is intended to cover all cotton that I have now or may have this year on said two plantations, supposed to be about 2,000 bales.

C. S. MOREHEAD.

April 18, 1862.

This bill of sale, assignment, or contract was executed and delivered when both parties were citizens and residents of the State of Kentucky. The plantations to be worked were in disloyal territory, and had been owned by Morehead from a time anterior to the war.

All the cotton, the proceeds of which are now claimed, was still to be raised thereon.

The vital question is presented whether or not Morehead or Briggs, under his contract or assignment, acquired a valid title against the United States to the cotton thereafter in that year to be grown and gathered on those plantations in hostile territory.

It is laid down in Lawrence's Wheaton on International Law, part IV, ch. 1, p. 576, edition of 1863, that "the produce of an enemy's colony or other territory is to be considered as hostile property so long as it belongs to the owner of the soil, whatever may be his national character in other respects or wherever may be his place of residence." The learned author thus quotes from and reviews the opinion of Sir William Scott on that subject:

"It cannot be be doubted," said he, "that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country in that particular transaction independent of his own personal residence and occupation."

It was contended that this rule, laid down with so much precision, did not embrace Mr. Bentzon's claim, because he had not "incorporated himself with the permanent interests of the nation." He acquired the property while Santa Cruz was a Danish colony, and he withdrew from the island when it became British.

This distinction did not appear to the court to be a sound one. The identification of the national character of the owner with that of the soil in the particular transaction is not placed on the dispositions with which he acquires the soil or on his general national character. The acquisition of land in Santa Cruz bound the claimant, so far as respects that land, to the fate of Santa Cruz, whatever its destiny might be. While that island belonged to Denmark the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the general national character of the particular proprietor.

Such is the law of prize. Although the present action is not limited to that law, we learn from it, what has an important and material bearing in this suit, that all property produced within enemy's territory, by whomsoever owned, is stamped with the character of that country as having contributed directly or indirectly in its production or otherwise to the resources of the enemy, by whom it can be appropriated at any time to hostile purposes. No act of the owner can free such property from that inherent character nor prevent the laws and power of the enemy from laying upon it contributions to carry on the war.

14 The subject-matter of the contract or assignment in this case, cotton produced in hostile territory during the war, was peculiarly and emphatically hostile property.

In Mrs. Alexander's case (2 Wall., 420) Chief Justice Chase, speaking for the Supreme Court, said: "It is well known that cotton has constituted the chief reliance of the rebels for means to purchase the munitions of war in Europe. It is matter of history that, rather than permit it to come into the possession of the national troops, the rebel government has everywhere devoted it, however owned, to destruction. The rebels regard it as one of their main sinews of war."

In the case of Young, trustee, etc., of Collie (97 U. S. R., 59) Chief Justice Waite, after referring to cotton during the rebellion as "being 'potentially an auxiliary' of the enemy and constituting a means by which they hoped and expected to perpetuate their power," quotes with approval the above and other language from the same opinion. Again, in the case of Lamar, ex., *v.* Browne *et al.* (92 U. S. R., 194), the same learned Chief Justice said: "That cotton, though private property, was a legitimate subject of capture is no longer an open question in this court. It was the foundation on which the hopes of the rebellion were fixed. It was substantially the only means which the insurgents had of securing influence abroad. In the hands of private owners it was subject to forced contributions in aid of the common cause. * * * It is not too much to say that the life of the Confederacy depended as much upon its cotton as it did upon its men. If they had had no cotton they would not have had after the first year or two the means to support war. To a very large extent it furnished the munitions of war and kept the forces in the field."

So in Sprott's case (20 Wall., 462) Mr. Justice Miller said:

"It is a fact so well known as to need no finding of the court to establish it, a fact which, like many other historical events, all courts take notice of, that cotton was the principal support of the rebellion, so far as pecuniary aid was necessary to its support. The Confederate Government early adopted the policy of collecting large quantities of cotton under its control, either by exchanging its bonds for the cotton or, when that failed, by forced contributions."

The cotton seized, the proceeds of which are now claimed, was not in existence when the contract or assignment was made. It was wholly of the crop afterwards to be grown. Much active and expensive work was to be done. Whether or not the seed had been planted at the time the assignment was made does not appear. It was so early in the season, April 18, that if the seed had been planted its growth had scarcely begun. No delivery was then made and none could be made in the state of the crop and in the condition of the country, and none was ever subsequently made.

Cotton is not of spontaneous growth, like wood, which comes to maturity when left to itself For its production the land must be plowed and prepared, seed must be purchased and planted, the ground must be kept free from weeds, and the cotton must be picked, ginned, and baled, all requiring the employment of labor and the expenditure of money. The labor employed must in this case have been that of persons residing in hostile territory and who in law were enemies. The money expended must have been sent across the lines or procured of enemies by contract of

borrowing or of sale of property between them and the owner in a loyal State.

These acts could have been done only by Morehead himself or through an agent or at the instance of the claimant's testator, who was most of all to be benefited by them.

The findings show that in point of fact Morehead, while a citizen of Kentucky, was at his plantation in Mississippi after the war began and left them in charge of agents, who superintended the raising of the cotton and also had the general direction of the affairs of the plantation in the years 1861, 1862, and 1863. The exact time when the agents were appointed is not in proof. The instructions given and the powers intrusted to them do not appear and are only to be presumed from what was done. It is found as a fact that part of the cotton was stored at a place used for the storage of cotton belonging to the Confederacy and for that of individuals who intended to sell to the Confederacy, and was marked C. S. A. Some of it was actually sold to the Confederate Government by one of the agents for the purpose of raising money with which to carry on the plantation.

Thus while the United States forces were seizing cotton wherever found in hostile territory in order to diminish the revenues and weaken the power of the enemy Morehead and Briggs were interested in raising a crop of cotton, which of necessity would increase those resources and strengthen that power. It was against public policy that residents of loyal States should have such interest and should contract with each other upon it.

Much of such interest and of such contracting would have destroyed the loyal cause.

In the case of Grossmeyer *vs.* The United States (9 Wall., 75), brought under the abandoned or captured property act, the Supreme Court held that the plaintiff, a citizen of New York, was not the owner of cotton purchased for him in enemy's country by his creditor residing therein, whom, after the war began, he had directed to invest the sum due in cotton and hold it for him until the close of the war, and that "not being the owner of the property he has no claim against the United States."

Mr. Justice Davis, in delivering the opinion of the court, said:

We are not disposed to deny the doctrine that the resident in the territory of one of the belligerents may have in time of war an agent residing in the territory of the other to whom his debtor could pay his debt in money or deliver to him property in discharge of it, but in such a case the agency must have been created before the war began, for there is no power to appoint an agent for any purpose after hostilities have actually commenced, and to this effect are all the authorities. The reason why this cannot be done is obvious, for while the war lasts nothing which depends on commercial intercourse is permitted. * * *

Besides, if, as is conceded, Grossmeyer was prohibited from trading directly with the enemy, how can the purchase in question be treated as lawful when it was made for him by an agent appointed after his own disability to deal at all with the insurgents was created?

This decision had reference to the non-intercourse act of July 13,

1861 (12 Stat. L., 255), which the claimant contends does not apply to the case of raising cotton in the manner this cotton was raised, but applied only to the commercial intercourse of trading with the enemy in its restricted sense of buying and selling. We cannot accept this view. It was as much a violation of that act for Morehead in hostile territory to have agents to work his plantations,
16 with the result that the agents made sale to the Confederate States of part of the cotton raised to obtain means of cultivating the plantations, as were any acts of Grossmeyer.

The transactions of Morehead & Briggs were not only prohibited by the non-intercourse act, but by reason of the peculiar hostile character of the subject-matter of the contract—cotton—and its production and situation within enemy's territory were illegal as against public policy and in violation of the obligation of all citizens not to do any act through which the enemy may obtain power, assistance, or advantage.

Had Morehead owned a manufacturing establishment in disloyal territory at the breaking out of the war he might have continued the manufacture of arms and ammunition and have contracted for the sale of the future production with as much legality as to have raised cotton on his plantations in disloyal territory, where it was subject to taxation for continuing the war, as well as to all the laws of the Confederacy, and was within the grasp of Confederate authority to take and use for hostile purposes.

As was said in Walker's case (12 C. Cl's R., 408, 430), "The transactions were throughout, in the language of the Supreme Court, 'tainted with the vice of the rebellion,' and that vice, as against the United States at least, destroys every contract, makes void every purchase, and bars every claim into which it enters."

The President's proclamation of pardon and amnesty of December 25, 1868 (15 Stat. L., 711, 712), is of no avail to the claimant. Amnesty threw oblivion over crimes and offenses, but did not disturb pre-existing rights of property. It left untouched past and completed transactions in contracts and property to stand upon their validity at the time of consummation. It did not make valid that title to the cotton which Briggs illegally attempted to acquire in 1862, more than six years before the issue of the proclamation of pardon and amnesty, nor did it give him a right to its proceeds arising from the seizure and sale by the defendants in 1863. Those proceeds, after having been held some years to the credit of the Treasurer of the United States, were finally "covered into the Treasury" by order of a resolution of Congress, March 30, 1868 (15 Stat. L., 251; 21 C. Cl's R., 420). That proclamation removed the bar of disloyalty, and persons who had committed crimes and offenses by disloyal acts might thereafter bring suits in the Court of Claims under the provisions of laws then existing, but it gave no rights of property and cured no defects of title thereto.

The court has not passed upon the question whether the assignment relied upon by the claimant was intended as an absolute sale or as a mortgage or pledge, because the judgment is for the defend-

ants on the grounds applicable alike to the instrument, whichever way it be interpreted.

The opinion of the court is that Morehead had no legal title to the cotton as against the United States; that Briggs, the claimant's testator, acquired none by the assignment to him, and that the claimant has no rights to the proceeds in the Treasury.

The petition therefore is dismissed.

17 VII.—*Judgment of the Court.*

At a Court of Claims held in the city of Washington on the third day of February, A. D. 1890, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, James A. Briggs, executor of C. M. Briggs, deceased, be dismissed.

By the court.

18 VIII.—*Application of Claimant for and Allowance of Appeal.*

JAMES A. BRIGGS, Executor of C. M. Briggs, Deceased,
vs.
THE UNITED STATES. } 16262.

Now comes James A. Briggs, the executor of C. M. Briggs, claimant herein, and appeals from the decision rendered herein on the third day of February, 1890, and asks that his appeal be allowed and certified to the Supreme Court of the United States.

W. J. MOBERLEY,
Attorney for Claimant.

Filed April 28, 1890.

Allowed in open court June 2, 1890.

WILLIAM A. RICHARDSON,
Chief Justice.

19 In the Court of Claims.

JAMES A. BRIGGS, Executor of C. M. Briggs, Dec'd,
vs.
THE UNITED STATES. } 16262.

I, John Randolph, assistant clerk Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at Washington city, this 30th day of June, A. D. 1890.

Seal Court of Claims.

JOHN RANDOLPH,
Ass't Clerk C't of Claims.

Endorsed on cover: Court of Claims. No. 1211. James A. Briggs, executor of C. M. Briggs, deceased, appellant, *vs.* The United States. Filed July 11, 1890.

Office Supreme Court U. S.
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JAMES. H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

JAMES A. BRIGGS, EX. OF C. M. BRIGGS, DECEASED,
APPELLANT,
vs.
THE UNITED STATES,
APPELLEE.

No. 1211.

ARGUMENT OF MR. PHIL. B. THOMPSON, JR.

PHIL. B. THOMPSON, JR.,
W. J. MOBERLEY,
Counsel for Appellant.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1891.

Supreme Court of the United States.

OCTOBER TERM, 1890.

JAMES A. BRIGGS, EXECUTOR OF C. M. BRIGGS, DECEASED, *Appellant*,

v.

THE UNITED STATES, *Appellee*.

No. 1211.

James A. Briggs, executor of C. M. Briggs, deceased, upon his appeal from the decision of the Court of Claims of the United States, at Washington, D. C., by judgment rendered on the 3d day of February, 1890, says said court erred in deciding, as a conclusion of law from the facts found, that the claimant had no cause of action in dismissing his petition.

2. He further says that the Court erred, to his prejudice on the facts found, in deciding that Morehead had no title to the cotton in controversy.

3. He further alleges an error upon the part of the Court in holding, in its opinion, that the sale of the cotton to Briggs was illegal.

4. He alleges, as further error on the part of the Court, that the sale to Briggs by Morehead did make Briggs the owner of the cotton.

5. He alleges, as further error, that the Court did not render judgment for one hundred and one thousand seven

hundred and ninety-four $\frac{57}{100}$ dollars, the net proceeds of the four hundred and fifty-five bales of cotton, the property of C. M. Briggs, deceased, now in the Treasury as directed by the act of Congress of June 4, 1888.

6. The Court erred in not rendering judgment in behalf of appellant for ninety-one thousand dollars, being the proportion which they found his four hundred and fifty-five bales bore to the whole number of bales accounted by Fort, proceeds of which are now in the Treasury, as directed by the act of June 4, *supra*.

And to sustain the aforesaid errors assigned, he files the following brief:

The facts in this case are set out so clearly in the findings of the Court of Claims that a mere reference to them is sufficient.

Charles A. Morehead, who was once governor of Kentucky and who lived there and practiced law in partnership with C. M. Briggs, was the owner of two plantations near Eggs Point in Mississippi. In the spring of 1861, when the war broke out, he was on his plantations, and sometime in May or June, when a prolonged war seemed almost certain, he left his plantations in charge of his overseer, who had been in his employ for several years, and returned to his home in Kentucky. His son was also there and had charge of one. It does not appear what instructions were left with them. Morehead was arrested and confined in Fort Warrent as a suspected rebel, and took the oath of allegiance and was released. There is nothing to show he ever communicated in any way with the agents South. On the 18th day of April, 1862, he sold, by bill of sale in writing, all the cotton on his plantations, baled and unbaled, gathered and ungathered, and all that would be in the year 1862, to satisfy money he owed Briggs and debts which Briggs was bound to pay for him.

Four hundred and fifty-five bales of the cotton, raised in 1862, was captured and the proceeds, amounting, as we claim, to one hundred and one thousand seven hundred and fifty-four $\frac{57}{100}$ dollars, and found by the Court to be ninety-one thousand, are now in the Treasury, for which we ask judgment by authority of the act of Congress dated June 4, 1888, and for which suit was filed and dismissed by the Court of Claims by judgment of February 3, 1890, from which the claimant has appealed, and asks a reversal of the judgment upon the errors herein assigned, and as good reason for his said request says:

The questions of law arising in this case upon the facts found are not many or intricate.

HAD MOREHEAD GOOD TITLE TO THE COTTON?

The lower court in its first finding found that "on the "18th day of April, 1862, Charles S. Morehead was * "* * the owner of two plantations in Washington county, "State of Mississippi, near Eggs Point and Greenville, in "said State." In the VIth finding, that "in the year 1862 "said" (his Morehead's) "agents, in the control of said "plantations for said Morehead, raised a crop of cotton on "said plantations, a portion of which in December, 1862, "was, by the direction of said agent, hauled to Wilson's "burn, * * * and in the month of March, 1863, * "* * was taken possession by Capt. E. D. Osband, act-"ing under orders of Gen. Grant." * * *

In the opinion rendered by the Court, we find this remarkable statement: "The opinion of the Court is that "Morehead had no legal title to the cotton as against the "United States." * * *

Is it possible that we have to open this case with authorities to prove that the owner of a plantation had the title to a crop raised on it by his overseer?

We will not insult the intelligence of the Court by citation of authority or argument to show that the owner of land is entitled to the products. If the title was not in Morehead, in whom was it? It must rest somewhere. The common law throws the title to every species of property upon some one, and where and in whom was the title to this cotton raised upon Morehead's own plantation by his own slaves and agents and at his own expense, if not in him?

It must be that the Court meant that because the cotton was raised inside of the Confederacy, after the commencement of hostilities, that the fact that Morehead was a resident and citizen of "Kentucky" in some way destroyed his title.

Does the fact it was raised inside the Confederate Lines destroy his title?

Is this true? Was it against public policy for Morehead to leave his overseer to carry on his plantations while he left the seat of war and returned to loyal territory? Was it an act in aid of rebellion to raise cotton inside the Confederate lines, so that no title to the crop passed to the owner of the plantation?

The Court says: "The transactions of Briggs and More-
" head were not only prohibited *by the non-intercourse act*,
" but by reason of the peculiar hostile character of the sub-
" ject-matter of the contract—cotton—and its production
" and situation within the enemy's territory, were illegal as
" against public policy and in violation of the obligation
" of all citizens not to do any act through which the enemy
" may obtain power, assistance, or advantage."

This doctrine is against every decision of this court and the Court of Claims rendered in cotton cases growing out

of the rebellion. If true, no person could have been paid one cent for his cotton under these acts, yet this Court has directed the payment of millions to the loyal owners of just such cotton as this "produced and situated in enemy's territory." If raising cotton aided the rebellion and strengthened its arm, how much more so did corn and wheat and pork and beef? The one only used to clothe, the other to sustain the soldiers in the field; one taken by the tithe system that prevailed direct to the army, the cotton only incidentally at most an auxiliary.

Is it true that Morehead could not cultivate and carry on his plantations without being guilty of "doing an act "through which the enemy might, in some way," be benefited?

How were his innocent slaves to be fed and clothed? How were his innocent neighbors, women and children, to be cared for? If he could not carry on his plantation no one else could carry on theirs, and thus starvation and nakedness would be thrown broadcast upon the old, the sick, the feeble, the helpless, and the innocent non-combatants.

No such doctrine as this prevailed in the days of Alarie. The Hotentots of South Africa would repudiate it; the bloody Geronimo would blush in his own savage counsel, if anyone should advocate it.

To say that because war exists between nations, or rebellion lifts its head so high and strong that belligerent right must be accorded the enemy, that the non-combatants on either side cannot pursue their avocations and callings, that the farmers cannot produce the necessaries of life, whether it be flax, cotton, wool, corn, or what not, without being charged, whether "a non-resident" or resident of the enemy's country, with being aiders and abettors, is too monstrous to be combatted or considered in this day of enlightened jurisprudence.

There could be no act, however peaceful of itself, which did not in some way give power, assistance, or advantage to the enemy. To engage in commerce, banking, farming, each and all had their effect upon its general prosperity, and thus increased its power, but will any court say that the fruits of the labor of these people did not belong to them, that they had no title?

And if the actual residents, those who remained inside the Confederate lines and raised cotton year after year, had title to their property, why not those who left? Was it a crime to withdraw, or did it aid the enemy to leave and not participate?

In the case of Moore *v.* The United States, 7th Court of Claims reports, page 360, the court said:

"At the death of claimant's father she was the owner in
" fee of a considerable landed estate in Mississippi, which
" descended to the said Lida, and the cotton involved in
" this case was raised in the *years* 1862–'63, on lands so
" descended to her by the labor of her own servants."

Held that she was the owner and entitled to recover.

The production of this cotton, it will be seen, was during the years 1862 and 1863, in territory in rebellion, and was situated there at the time of the capture, but these facts did not deprive the loyal owner of title. The fact that she produced it was not considered an act of disloyalty, because cotton was used as basis of credit by the Confederacy.

In B. Ogle Tayloe's case *v.* United States, 5th Court of Claims, p. 701, the facts were nearly identical with the case at bar. The facts, as stated in the opinion, are these:

"The claimant's testator was a loyal citizen of the Dis-
" trict of Columbia, and who, during the *entire rebellion*,
" *resided in the city of Washington.* He was before and

" during the war of the rebellion the owner of a cotton
" plantation in the State of Alabama. He had also a son
" residing there of the name of Edward Thornton Tayloe.
" B. Ogle Tayloe's plantation in Alabama was in charge of
" an overseer, and he continued to manage it during the
" war without communication with the owner in any way.

* * * * * * *

" Morgan (the overseer) had made crops of cotton in
" 1861 and 1862, of which he had stored seventy-two bales
" in the warehouse of A. Hatch, at Arcola, to the order of
" B. O. Tayloe; the rest of the cotton, some two hundred
" bales, was on the plantation. All was the property of
" B. O. Tayloe. In this state of things in 1863, Edward
" T. Tayloe thought proper to subscribe 150 bales of cot-
" ton to the Confederate Cotton Loan, and, at his request,
" Morgan, as his agent, gave a bill of sale to the Confed-
" erate agent for 150 bales of B. O. Tayloe's cotton, a part
" being in Hatch's store at Arcola and a part on the plan-
" tation, promising to deliver them at Arcola or Demopo-
" lis, to the order of the Confederate Secretary of the
" Treasury."

The cotton was seized, sold, and proceeds carried into the Treasury.

The Court held that the sale to the Confederate government by the overseer was void for want of authority; that B. O. Tayloe's title was good, and he was entitled to the proceeds.

Now, a suspicion had never entered the mind of the Court that B. O. Tayloe could not carry on his plantation in Alabama; that he had no right to raise cotton; that in doing so, through his agents, he was aiding the enemy by adding to their resources, and that he had no title to the cotton raised on his own plantation by his own labor, nor did the fact that some of his cotton was subscribed without authority to the Confederate Loan prevent him from recovering the proceeds of the subscribed cotton seized and sold.

As we grow away from the war the Court seems to grow more bitter and harsher than when the war was flagrant. Peace, instead of ameliorating, increases the asperities of war until Briggs, who was ever loyal, is now considered and treated worse than a rebel in arms.

Taylor's case is almost identical with the one at bar.

The case of R. M. and S. A. Douglass *v.* United States, 14th Court of Claims, page 2, *et seq.*, is another case in which the rights of loyal citizens residing in Illinois to cotton raised on their plantation in Mississippi during the war, by those left in charge thereof, was recognized and paid for, and strange to say it was a part of the same 2,111 bales seized by Osband and accounted for by Fort.

We call special attention to the 8th finding of facts in this case. It presents a most remarkable state of facts.

Two thousand one hundred and eleven bales of cotton are seized and sold. Samuel Worthington, a resident of Mississippi, remained at home and, on his own plantation with his own slaves, raised cotton, which the reasoning of the lower court in this case makes as bad as if he had manufactured arms for the Confederacy.

"Had Morehead owned a manufacturing establishment "in disloyal territory at the breaking out of the war he "might have continued the manufacture of arms and am- "munition and have contracted for the sale of the future "production with as much legality as to have raised cotton "on his plantations in disloyal territory, where it was sub- "ject to taxation for continuing the war, as well as all the "laws of the Confederacy, and was within the grasp of "Confederate authority to take and use for hostile pur- "poses."

Yet we find the Court of Claims paid Sam. Worthington's administrator, out of this fund, $165,673.42 for strenthening the arm of rebellion.

W. W. Worthington, who stayed at home and raised cotton, had a good title—was owner and was paid.

Eveline Hammett and Nannette Sweitzer were paid for their cotton taken from Wilson's burn, and all by judgment of the same Court, which now denounces Morehead for raising cotton, and declares he had no title to the cotton raised on his own plantation by his own servants.

The doctrine laid down by the Court, in the above paragraph of its opinion, was unknown in 1866, when the Worthington's were paid, and was never developed when the sons of Stephen A. Douglas, in 1878, were paid, but now, nearly a quarter of a century after the war is over, we are told that to raise cotton was as much an act of war as to manufacture arms, and that Morehead had no title on that account to his cotton.

It is inconceivable that an enlightened court in this day would put to record such an opinion. No belligerent ever declared an enemy had *no title* to his property, but the rule is to capture such as the modern rules of war justify, and the enemy's title thereby passes to the captor government.

Does the Law put Cotton on the same footing as Arms, Munitions of War, &c., &c.

To say there is no distinction between arms, munitions of war, and property employed in waging war, and cotton, is to break down distinctions, which are as old and well-founded as international law itself, and were expressly set out by Chief-Justice Chase in the Klien case (13 Wallace, p. 128), in which he says:

"It may be said in general terms that property in the "insurgent States may be distributed into four classes.

(1) "That which belonged to the hostile organizations " or was employed in actual hostilities on land.

(2) "That which at sea became lawful subject of cap- " ture and prize.

(3) "That which became the subject of confiscation.

(4) "A peculiar description known only in the recent " war as captured and abandoned property.

"The first of these descriptions of property, like prop- " erty of other like kind in ordinary international wars, " became wherever taken *ipso facto* the property of the " United States. (Halleck's Int. Law.) * * *

"Accordingly, it was provided in the abandoned and " captured property act of March 12, 1873 (12 Stat. at L., " 820), that the property to be collected shall not include " any kind or description used or intended to be used for " carrying on war against the United States, *such as arms*, " *ordinance ships, steam-boats and their furniture, forage*, " *military supplies and munitions of war.*

"It is thus seen," says the eminent judge, "that except " property used in actual hostilities as mentioned in act " of March 12, 1863, no titles were divested in the insur- " gent States unless in pursuance of a judgment rendered " after due legal proceedings."

The lower court ignores the provisions of the captured and abandoned property act distinguishing these classes of property, ignores the opinion of this Court establishing them, ignores it own opinions, in which they are recognized, and for the first time announces that to raise cotton was as bad as to manufacture arms, and no title ever vests in the producer.

Is a sale of a crop to be grown valid.

Having now shown that Morehead was the owner of the 455 bales of cotton, the question arises was the sale to Briggs valid?

This involves the question as to whether the cotton was sufficiently in *esse* to be the subject-matter of sale.

The sale was made April 18, 1862, and the Court did not find whether the cotton was, at the time of sale, planted and a growing crop or not.

But we imagine that this is immaterial under the decision of this Court in the case of Butt *v.* Elletts (19 Wallace, page 544), the question as to whether there can be a sale of a crop, not then planted, was considered and decided in the affirmative. Other cases hold the same doctrine.

"A transfer by a tenant of a farm to his landlord of all "the crops that may be grown upon the land during the "lease is valid." (Bellows *v.* Wells, 36 Vt., 599; Smith *v.* Alkins, 18 Vt., 461; Headrich *v.* Brattain, 63 Ind., 438; Andrew *v.* Newcomb, 32 N. Y., 417; Van Hover *v.* Carey, 34 Barb., 9, &c., &c.)

And many cases have held that when a person sells property which he expects to acquire, in equity, the title passes to the purchaser as soon as the property is acquired. (Benjamin, § 81, and notes.)

WAS ACTUAL DELIVERY NECESSARY TO PASS THE TITLE?

In the first place the law never requires an impossibility, and from the nature of the case this cotton could not be delivered. It was either not planted, or if planted was a growing crop. Secondly, it was situated in territory then held by the enemy and could not be reached by Briggs.

There can be no doubt that as between Briggs and Morehead as soon as they agreed to the sale the title passed.

The law of sale of personal property is thus laid down by Mr. Benjamin in his work on Sales. (Book 1, Par 1, p. 4.)

"§ 3. By the common law all that was necessary to give "validity to sale of personal property, whatever may have "been the amount or value, was the mutual assent of "the parties to the contract. As soon as it was shown "by any evidence, verbal or written, that it was agreed by "mutual assent that the one should transfer the absolute "property in the thing to the other for a money price, the "contract was completely proven and binding on both "parties. If by the terms of the agreement the property "in the thing passed immediately to the buyer, the con-"tract was termed in common law a bargain and sale; "but if the property in the goods remained for the time "being in the seller and only to pass to the buyer at some "future time, or on the accomplishment of certain condi-"tions, as for example it were necessary to weigh or meas-"ure what was sold out of a bulk belonging to the vendor, "then the contract was called in common law an execu-"tory agreement."

And in Benjamin, Book 2, chap. 2. The rules laid down in Sheppard's Touchstone and Noy's Maxims are said to remain the same to the present day in England, except that the consideration for the sale is no longer the payment of the money but the buyer's obligation to pay. In Semmons *v.* Swift (5 B. and C., 862), Bailey, J., said:

"Generally where a bargain is made for the purchase "of goods and nothing is said about payment or delivery, "the property passes immediately, so as to cast upon the "purchaser all future risk, if nothing remains to be done "to the goods, &c.

"As between vender and vendee it is specification and "not delivery that is necessary to the vesting of title. "(Winslow *v.* Leonard, 24 Penn. 14; Boom *v.* Haire, 40 "Mich. 404; Uld *v.* Robinson, 8 Nebraska 272; Wade "*v.* Moffit, 21 Ill. 110; 39 Ill. 195; 66 Ill. 106; Brown "*v.* Wade, 42 Iowa 647, &c., &c., *ad infinitum.*)"

In Tarling *v.* Baxter (6 B. and C.), Bailey, J., again said:

"The rule of law is that when there is an immediate "sale and nothing remains to be done by the vendor as "between him and the vendee, *the property in the thing* "*sold vests in the vendee.*"

In Gilmour *v.* Supple (11 Moo. P. C., 566), Sir Creswell Creswell, in giving an elaborate judgment of Privy Council, says:

"By the law of England by a contract for the sale of "specific ascertained goods, the property vests in the "buyer and a right to the price in the seller, *unless it can* "*be shown that such was not the intention of the parties.*"

The common law prevails in the State of Kentucky in which the contract was made. We quote from the decisions of the Court of Appeals of that State:

"As soon as a bargain of sale of specific personal prop- "erty is struck the contract becomes absolute, without "actual payment *or delivery.*" (Willis *v.* Willis, 6 Dana, 48; Sweeny *v.* Ourley, 14 Ben. Mon. 413; 1 Black. 476; 6 Wall. 548; 100 U. S. 124.)

"All that is essential to the sale of a chattel at common "law is the agreement of the parties that the property in "the subject-matter shall pass from the vender to the ven- "dee for a consideration given or promised." (Brown *v.* Long, 2 Duval, 322; Newcomb *v.* Cabbel, 10 Bush., 468.)

"A sale of personal property without delivery of posses- "sion or actual payment passes absolute title as between "the parties, and the property and risk of accident vests "in the buyer." (7 Bush, Buffington *v.* Ulen, 232; 10 Bush, Newcomb *v.* Cabbel, 471; 100 U. S., 124.)

There can be no doubt that the parties intended that Briggs should become the owner of the cotton and the title passed to him.

THE BILL OF SALE, EXECUTED AND DELIVERED AT THE TIME, WAS A SYMBOLIC DELIVERY OF THE PROPERTY.

Mr Benjamin, in his work on Sales, says:

"SEC. 1043. Book IV, part II.

"There may be a symbolical delivery of goods, divesting the vendor's possession and lien. Lord Ellenborough said, in Chaplain *v.* Rogers, that 'where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by the delivery of another *indicia of* property.' And there was a like *dictum* by Lord Kenyon, in Ellis *v.* Hunt. On this principle the delivery of the grand bill of sale of a vessel at sea has always been held to be a delivery of the vessel.

"SEC. 1044. So the endorsement and transfer to the buyer of bills of lading, dock, and wharf warrants, delivery orders, and other like instruments, which among merchants are known as representing the goods, would form a good delivery in *performance of the contract*, so as to defeat any action by the buyer against the vendor for non-delivery of the goods, according to the principles settled in Salter *v.* Woollams, and Wood *v.* Manley."

Transfer of a ship at sea by bill of sale, and of a cargo, or of goods in transit, or in a warehouse, by delivery of the bill of lading, are familiar instances of symbolic delivery. (See Conrad *v.* Atlantic Ins. Co., 1 Pet. 445; Gibson *v.* Stevens, 8 How. 384, 399; Prickard *v.* Read, 31 Ark. 131; King *v.* Jarman, 35 Ark. 190, 196; Davis *v.* Russell, 52 Cal. 611; Russell *v.* O'Brien, 127 Mass. 349.)

So we see that the law has been clearly settled not only by numerous decisions of our own courts that where the property is cumbersome or from its situation or condition actual delivery is impractical that the execution and de-

livery of an instrument of writing, evidencing the transfer of title, is all that is necessary to make the sale good.

FAILURE TO DELIVER POSSESSION STATUTE OF FRAUDS.

It was contended by the counsel for the Government, upon the trial of the case in the lower court, that the Government had a right to avoid the contract of sale between Morehead and Briggs, and treat it as a nullity because the actual possession of the property was not delivered to Briggs by Morehead at the time. That the statutes of XIII and XXVII Elizabeth provide, in substance, that an unconditional sale of a chattel unaccompanied by the delivery of possession with respect to creditors and purchasers for value is fraudulent and void, and that the Government by analogy in this case occupies the same position. Now, we contend on the other hand, that the Government has no title to this property except that of a captor; that by international law one belligerent has the right to seize and possess himself of all of the personal property of an enemy, and that as soon as possession of it is held for twenty-four hours the title to the property belongs to the captor Government. All writers on international law agree that the possession must be held for twenty-four hours because it is not a firm possession until then, and upon recapture by the enemy if not held for that length of time under the *just post limini* the title vests again in the particular individual who owned it at the time of its capture. (See Kent, vol. 1, p. 102–103–104.) In the case of Young *v.* United States, 97 U. S. Reports, p. 39 to 68, Chief-Justice Waite, delivering the opinion of the Court, said:

"Beyond all doubt, the late rebellion against the Gov-
"ernment of the United States was a sectional civil war,
"and all persons interested in or affected by its operations

"are entitled to have their rights determined by the laws "applicable to such a condition of affairs. It is equally "beyond doubt that, during the war, cotton found within "the confederate territory, though the private property of "non-combatants, was a legitimate subject of capture by "the national forces. We have many times so decided, "and always without dissent." (Mrs. Alexander's Cotton, II Wall. p. 404; U. S. *v.* Padelford IX Wall. p. 531; Sprot *v.* U. S., XX Wall. p. 459; Haycraft *v.* U. S., XXII Wall. p. 81; Lamar *v.* Browne, 92 U. S. 187.)

* * * * * *

"Being enemy's property, the cotton was liable to capture "and confiscation by the adverse party. It is true that "this rule, as to property on land, has received very im- "portant qualifications from usage, from reasonings of "enlightened publicists, and from judicial decision. It "may now be regarded as substantially restricted 'to spe- "'cial cases, dictated by the necessary operations of the "'war,' and as including in general, 'the seizure of private "'property of pacific persons for the sake of gain.'

* * * * * *

"All property within the enemy's territory is in law "enemy's property, just as all persons in the same terri- "tory are enemies. A neutral, owning property within "the enemy's lines, holds it as enemy's property, subject to "the laws of war, and, if it is hostile property, subject to "capture * * * The rightful capture of movable prop- "erty on land transfers the title to the Government of the "captor as soon as the capture is complete, and it is com- "plete when reduced to 'firm possession.'" * * *

In the case in V. Wall. p. 342 (The Gray Jacket *v.* The U. S.), it was held that "property found in the enemy's "territory is subject to capture as enemy's property "although owned by a loyal citizen of the United States."

This is undoubtedly a true exposition of the law, and from it we can deduce the full right and title of the Government to the cotton when captured, except as modified by

the captured and abandoned property acts. But does this capture place the Government in the same position under the statute against frauds passed by the State of Kentucky or the State of Mississippi, as that of a purchaser for value or a creditor has? We think not. It is neither a purchaser for value, for it paid no consideration, nor is it a creditor, because the owner of the property owes it no monetary debt. It has but one right, and that is the right, not derivable from any statute, but from the principles of international law as applicable to war between nations to seize such property as is necessary in the operations of war which will weaken the enemy or strengthen itself, and in making these captures after firm possession is held, the title becomes indefeasable in the Government, except as modified by its statutes aforesaid. Under the statutes of the States, *supra*, creditors and purchasers for value have the right to avoid a sale of personal property where the possession does not accompany the sale, but no such right by analogy exists with the Government. The Government rests its title alone upon that of capture.

The Court of Claims, in the case of Bernheimer *v.* The United States (5 C. C. p. 563), in an opinion by Nott, Justice, said:

1st. "We do not deem the defendants to stand in the "place of attaching creditors who have levied upon prop- "erty in the hands of debtor, for the reason that the de- "fendants had no pre-existing demand or equity against "the property of the holder, *and that all of their rights* "*sprang out of and were limited* by capture.

2d. "We do not deem the defendants acquired by cap- "ture the unquestionable *rights of a purchaser in good* "*faith for a valuable consideration*, for the reason that "the defendants *parted with nothing when they acquired* "*the property*, nor drew to themselves by value given the "equity which the courts are ever ready to maintain.

"So we see there is no analogy between the right which "the Government holds as captor and a purchaser for "value or a creditor."

In Kentucky, where this bill of sale was executed, "a "deed or bill of sale, though fraudulent, is good between "the parties, and can only be impeached by creditors or "purchasers." (Gillispie *v.* Gillispie, 2 Bibb, 91; Dale *v.* Harrison, 4 Bibb, 65; Mason *v.* Baker, 1 Mar. 210; Dehaven *v.* Sterret, 3 J. J. Mar. 31; Anderson *v.* Bradford, 5 J. J. Mar. 76; Wikliffe *v.* Lions, 5 J. J. M. 87; Chiles *v.* Bernard, 3 Dana, 97; Thomas *v.* McCormick, 9 Dana, 111; Norris *v.* Norris, *Ibid*, 317; Kendall *v.* Hughs, 7 B. Mon. 371; Isaacs *v.* Gearhart, 12 Ben. Mon. 235; Phillips *v.* Jamison, 14 B. Mon. 584.)

"A fraudulent deed is good against all the world except "creditors and purchasers." (2 Bibb, 417, Gilpin *v.* Davis; 1 Mar. 114, McCreery *v.* Pursley; 2 Mar., 203 Vandemer Long.)

"A purchaser is one who has acquired title for a valua-"ble consideration." (2 Bibb, 416.)

So we see that in Kentucky, Mississippi, and wherever the common law obtains, the execution and delivery of a bill of sale passes the title from the vender to the vendee, is good against the whole world except creditors and purchasers for value, who may impeach it for fraud.

The right to impeach a sale of personal property where there is no actual visible change of possession is reserved to purchasers and creditors only, by section 3, chapter 40, of the Revised Statutes of Kentucky, which revision was in force at the time this bill of sale was executed, and a failure to deliver the goods to the vendee only rendered the sale void as to purchasers *without notice* and creditors. Such sale was good against all others.

The Government in captured property occupies a much higher and stronger position than any purchaser for value, *without notice*, or creditor holds, because if the property is in an enemy's country, no difference in whom the title rests whether it be in the original owner or a purchaser for value or one to whom he has sold it without accompanying possession, in whomsoever it is when captured, all of the owners being enemies, the title to the property on firm possession established passes to the Government of the captor. As was said in the case of Young, *supra*, the rules of war and of international law on the subject of capture "have been very much modified by very im- "portant qualifications from usage from reasonings of en- "lightened publicists and from judicial decision, and is "limited to special cases, dictated by the necessary oper- "ations of war, and excludes in general the seizure of pri- "vate property of pacific persons for the sake of gain."

THE RIGHT OF THE UNITED STATES TO CAPTURED COTTON.

But we are not left in this case to the uncertainty of usage or reasoning of enlighted publicists or judicial decisions to determine the right which the United States Government has to cotton when captured. The Congress of the United States has, in its wisdom under the power given it by the Constitution to make rules for the disposition of captures on land or at sea, passed what was known as the Captured or Abandoned Property Act of 1863–1864, in which it declared that this class of property when captured should be sold and the net proceeds paid into the Treasury and paid over upon suit filed within the time limited by the statute, which was two years, to the loyal owner. This overthrew the entire common law relating to captures, and Chief-Justice Chase, in the case of the

United States *v.* Kline (13 Wall. p. 128 to 150 inclusive), says :

"In the case of Padelford, we held that the right to the "possession of private property was not changed until "actual seizure by proper military authority, and that "actual seizure by such authority did not divest the title "under the provisions of the Abandoned and Captured "Property Act. The reasons assigned seems fully to war- "rant the conclusion. The Government constituted itself "the trustee for those who were by that act declared enti- "tled to the proceeds of captured and abandoned prop- "erty, and for those whom it should thereafter recognize "as entitled. * * * There is, as we have already ob- "served, no confiscation, but the proceeds of the property "have passed into the possession of the Government, and "restoration of property is pledged to none except to those "who have continually adhered to the Government. "Whether restoration will be made to others or confisca- "tion will be enforced, is left to be determined by consid- "eration of public policy subsequently to be developed."

He declares that the object and purpose of the captured and abandoned property act was to ameliorate and dispense with that harsh rule which took title to the Government for every class of personal property which was captured to modify the rule of war, so that no title to any property which belonged to the class known as captured and abandoned property was ever divested but passed into the Treasury of the United States, in trust for those who should thereafter show themselves entitled under the statute to it. The Government had a right to abandon and surrender its title by capture to all this class of property to any one that it desired to. It is only the very hardest and severest rule of law under which this class of property could possibly be seized by a civilized government. It was the property of non-combatants, many of whom were forced

by their location and situation only and not by their desire to remain within the territory held by the confederate government. It was the property of men like Morehead who left the Confederate States because they did not desire to cast their fortunes with them; it was the property of loyal men of the North who had investments in that section of the country, whose investments must be cared for during the war by their agents and servants, and while their property situated in the enemy's territory, under the rules of war, was enemy's property and subject to capture and to the divesting of the title by capture, and investing of it in the government of the captor, yet the United States had the right by its legislature to modify this rule and declare that all captured property or abandoned property should be sold and the proceeds put in the Treasury and held in trust for those who should thereafter show themselves entitled to receive it.

In Haycraft case (22d Wallace, pp. 81 to 98), the Kline case was reviewed by Chief-Justice Waite and reaffirmed, and he quotes from one of the earliest cases under the Captured and Abandoned Property Act which came to the Supreme Court, namely, Mrs. Alexander (2d Wall. p. 404–423), in which the Court says:

"But by the act in question," to wit, (Captured and "Abandoned Property Act,) "the Government yielded its "right to seize and condemn the property which it took in "the enemy's country, if it belonged to a faithful citizen, "and substantially said to him, 'We are obliged to take the "'property of friend and foe alike, which we will sell and "'deposit the proceeds of in the Treasury; and if at any "'time within two years after the suppression of the re-"'bellion you prove satisfactorily that, of the property "'thus taken, you owed a part, we will pay you the net "'amount received from its sale,'" and, it is again declared

in this opinion, that these net-proceeds are a trust fund, and that the title to the property was never divested from its owner, whether loyal or disloyal, but remains there to be either recovered by the authority of Congress, or confiscated by proper proceedings under it.

So we see from the authorities cited and quoted that the Government of the United States never could have acquired the position of a purchaser for value without notice, or a creditor, who alone has the right to avoid an unconditional sale of personal property because actual or symbolic possession did not accompany the sale. We see further from these decisions that the capture of this property never divested the title from Briggs which he had acquired from Morehead by his sale, and in any event the United States Government has no title to it because no proceedings of condemnation or confiscation have ever been taken to invest it with title.

Was there an Effort to Defeat the Right of the Government to Capture or Confiscate this Cotton?

There was some contention made in the lower court that the sale made by Morehead to Briggs had for its object the purpose to defeat the right of the United States Government to confiscate this property by putting it out of Morehead's hand, who was suspected of disloyalty because his property was in Mississippi, and in this way the transaction was alleged to be a fraud upon the Government. This view of the case strikes us as being almost too whimsical to need a response. In the first place the sale was made by Morehead after he had taken the oath of allegiance to the United States and been discharged from his illegal imprisonment. Secondly, it was made on the 18th day of April, 1862, when the confiscation act, under which the

Government might confiscate it, if it ever got possession of it, and which is the first declaration of a purpose to confiscate enemy's property was not passed until July 17, 1862; and, further, the sale was made nearly a year before the Captured and Abandoned Property Acts were passed, in which a pledge was made to give to the loyal owner the proceeds of his property when captured. How could it, then, be contended that they had in contemplation the defeat of statutory rights upon the part of the Government, which had never been contemplated nor even moved in Congress at the time. You can see at a glance how futile it would be for them by this transfer to undertake to defeat the common law right of capture by the Government for the title would pass, if captured, at common law to the Government of the captor, regardless of whether it was Morehead's or Briggs', and whatever right Briggs has in this case is created and preserved to him by the Captured and Abandoned Property Act. He could not have anticipated, nor could either of them, that such a statutory right would ever be made or that it would ever be preserved; hence could not be preparing a year in advance to receive the benefit of it.

CAN TWO CITIZENS DOMICILED IN A LOYAL STATE CONTRACT WITH REFERENCE TO PROPERTY INSIDE THE CONFEDERATE LINES?

There is one other question in the case left for discussion, and that is whether or not Briggs and Morehead, both residing in Louisville, Kentucky, a loyal State and far inside the Federal lines, being citizens thereof, could make a contract between themselves by which the title to property situated in the Confederacy inside of the enemy's lines would pass from one to the other. If they can do so they did do so, and the title to Briggs to this cotton is

perfect. There can be no doubt, from numerous decisions of this Court, that all contracts between resident citizens even of the States in rebellion amongst themselves as to their property was good and the title passed, and this though the property about which they contracted *was situated in loyal States and inside of the li..es of the army of the United States.* We have two cases decided by the Supreme Court upon this point. Justice Field discussed thoroughly, in the case of Conrad *v.* Waples (6 Otto, 279 to 290 and 293 to 312 inclusive), the question whether or not a deed, made on the 6th day of May, 1862, by Conrad father to Conrad sons, both being rebels in arms and inside of the rebel lines, passed a title to the sons from the father for property situated in New Orleans then within the firm possession of the United States Government and so proclaimed by General Butler, the commanding general, and discussed thoroughly the effect of the confiscation act of July 17, 1869; following out said sale and deed, he declared that it was not a fraud on the confiscation act, which was not contemplated at the time, for the father to deed the property to the son.

Second, he held that the deed passed the title to the sons from the father, although made inside the Confederate lines and the property located inside of the Federal lines, and that from that time forward they were the owners of the property. He says:

"If we apply these views to the case at bar we must
" hold that there was nothing in the proceedings and de-
" cree under the confiscation act against the property of
" elder Conrad, upon which the defendant in his answer
" relys, which could in any respect affect the right of the
" younger Conrad's to the lands conveyed to them before
" that act was passed, unless the fact *that the parties to*
" *the conveyance* were, at the time of the sale, engaged in

" the rebellion against the United States and were within
" the enemy's country, rendered *it unlawful for the* father
" to transfer and the sons *to receive the title to real property*
" *situated within the Federal lines.* The illegality of the
" sale on this ground was insisted upon in the court below
" and position was there sustained, but we do not think the
" position at all tenable. The character of the parties as
" rebels or enemies did not deprive them of the right
" to contract with and to sell each other, as between them-
" selves, all the ordinary business between people of the
" same community in buying, selling, and exchanging prop-
" erty, moveable and immoveable, could be lawfully car-
" ried on, except in cases where it was expressly forbidden
" by the United States or where it would have been incon-
" sistent with or would have tended to weaken their au-
" thority. It was commercial intercourse and correspond-
" ence between the citizens of one belligerent and those of
" the other; and engaging in traffic between them, which
" were forbidden by the laws of war and by the President's
" proclamation of non-intercourse. So long as the war ex-
" isted between them with actual hostilities it was unlawful,
" but commercial intercourse and correspondence of the
" citizens of the enemy's country among themselves were
" neither forbidden nor interfered with so long as they did
" not impair or tend to impair the supremacy of the na-
" tional authority, or the rights of loyal citizens. No people
" could long exist without exchanging commodities, and,
" of course, without buying, selling, and contracting, and
" no belligerent has *ever* been so *imperious and arbitrary*
" as to attempt to forbid the *transaction of ordinary busi-*
" *ness* by its *enemies among themselves.* No principle of
" public law, and no consideration of public policy could
" be subserved by edict to that effect, and its enforcement,
" if made, would be impossible. If, then, intercourse be-
" tween Conrad father and son, they being all enemies,
" was not unlawful; if between them contracts for the pur-
" chase and sale of property in respect to which there was
" no special interdict would have been binding, the sale in
" the case at bar can only be impeached if at all by reas-
" ons of *the situation of property within the Federal lines,*

" and from that circumstance it could not be impeached
" unless the sale, if upheld in some way, frustrated the en-
" forcement of the right of seizure and confiscation pos-
" sessed by the United States; it may be admitted that the
" right of a belligerent to confiscate the property of enemies
" found within its territory, cannot be impaired by a sale
" of the property during the war, but it is perceived that
" on any other ground the sale could be invalidated, a con-
" veyance in such case *would pass the title*, subject to be
" defeated, if the Government should afterwards proceed
" for its condemnation."

The same doctrine was announced in Burbank *v.* Conrad, 6 Otto, p. 291, and the same principle was sustained in the case of Corbett *v.* Natt, reported in the 10th Wall. p. 464.

Now, then, it follows as a consequence that if residents of the States in rebellion could, by contract made amongst themselves in the course of commercial business, transfer the title to property situated inside of the United States lines and which was subject to seizure as enemy's property, what possible reason can exist for denying to residents of loyal States the right to sell to each other, in a commercial way, property situated inside of the enemy's lines.

The sale made by Morehead to Briggs was made months before the confiscation act of July 17, 1862, was passed, and could not contravene any right or deprive the United States of any power it had upon capture to seize and confiscate this property. It has been expressly declared by the Supreme Court, not only in the case quoted but in many others, that the confiscation act was not retroactive, and that it did not reach back and destroy titles acquired before its passage, and consequently Briggs could not have contemplated that his purchase of Morehead's cotton could in any way deprive the United States Government of any subsequent rights under the act

of July, 1862. The only right it had at the time he bought was the common law, right of capture, the right to seize any property inside of the Confederate lines, any of what is termed enemy's property, and thus acquire by capture the title thereof. This property was as much enemy's property in the hands of Briggs as it was in the hands of Morehead; every right which the Government had against it on the 18th day of April, 1862, was preserved to it and remained with it the same after the sale as it did before, consequently there being no injury to the Government in the slightest way, there could be no public policy which would forbid these two residents of the State of Kentucky from entering into a commercial transaction which merely passed the title of property from one to the other. There was no contract that Briggs was to remove the property from the State of Mississippi to the State of Kentucky, or to move it at all. There was no arrangement made by which Briggs was to have or hold any communication with the agents across the lines. There was no trading across the lines in this case between enemies, but a trading between residents of a loyal State with each other, and a trade which in no way effected any belligerent right of the United States Government.

In the case of Edward Matthews *v.* Nelson McStea, in the 91 U. S. Reports, p. 189, Mr. Justice Strong said, delivering the opinion of the Court, and in it he reviewed thoroughly the question as to how far commercial intercourse between the residents of the two sections was prohibited, and his conclusions were clear and are worthy of further consideration at the hands of the Court. He says: "It must also be conceded, as a general rule, to be one of the immediate consequences of a declaration of war, and the effect of a state of war, even when not declared, that all commercial intercourse and dealing between the subjects or adherents of the

"contending powers is unlawful, and is interdicted. The "reasons for this rule are obvious; they are, that, in a state "of war, all the members of each belligerent are respect- "ively enemies of all the members of the other belligerents, "and, were commercial intercourse allowed, it would tend to "strengthen the enemy, and afford facilities for conveying "intelligence, and even for traitorious correspondence; "hence it has become an established doctrine that war puts "an end to all commercial dealing between the citizens or "subjects of nations or powers at war, and 'places every "'individual of the respective governments, as well as the "'governments themselves, in a state of hostility,' and it "dissolves commercial partnership existing between the "subjects or citizens of the two contending parties prior "to the war, for their continued existence would involve "communicative things and mutual dealings between "enemies."

* * * * * *

"But, while all this is true as a general rule, it is not "without exceptions. A state of war may exist and yet "commercial intercourse be lawful. They are not neces- "sarily inconsistent with each other. Trading with a "public enemy may be authorized by the sovereign and, "even to a limited extent, by a commander. Such per- "missions or licenses are partial suspensions of the laws "of war, but not of the war itself. In modern times they "are very common."

The judge then, in his opinion, shows that up to the passage of the act of the 13th day of July, 1861, 12 Stat. at L. 255, and the President's proclamation of the 16th of August, 1861, 12 Stat. at L. 1262, commercial intercourse was not prohibited between citizens of the rebellious States and citizens of the United States, and after that time only in so far as the act and proclamation forbade them. Now

what was the effect of the non-intercourse act? It provided: "It may and shall be lawful for the President by "proclamation to declare that the inhabitants of such State "or any section or part thereof where such insurrection "exists are in a state of insurrection against the United "States, and thereupon all commercial intercourse by and "between the same and the citizens thereof, and the citizens "of the rest of the United States shall cease and be un- "lawful so long as such condition of hostilities shall con- "tinue."

This forbade, only when proclaimed by the President, the citizens of the States, declared to be in insurrection, from trading and holding commercial relations with the citizens of the other States not in insurrection, but upon what principle or authority can we hold that the citizens of the loyal States were not authorized to trade with each other. It can be put in the case of the contract between Briggs and Morehead on one ground only, as is said by Justice Field in the case, *supra*, and that was that the property, about which the trade was made, was situated inside of the Confederacy. No proclamation or act of Congress forbade them from trading, and it seems to us that no public policy interferes with it. On the contrary, the act of 1863, known as the Captured and Abandoned Property Act, was expressly passed in the interest of men like Briggs who owned cotton and other property inside of rebel territory. That act declared that whoever was the owner of the property at the time of its capture was entitled to its proceeds if he was loyal. It did not require him to have either raised it or to have owned it at any time anterior to the war, and as the sale in April, 1862, passed the title to Briggs, and the act, declaring the restoration of the proceeds passed a year after, was a wise and benificent act upon the part of the Government towards its citizens

as said in Kohn's case, vol. 5, p. 603, Court of Claims. "These captured and abandoned property cases are without precedent; the time within which they might have "been brought was brief; the statute upon which they rest "is remedial, and *a just claim should not be defeated if* "*upon any legal theory it can be sustained.*"

The case of Grossmeyer *v.* U. S., referred to in opinion of the lower court, is based upon a sound principle. Grossmeyer undertook to establish an agency inside of the enemy's territory after the proclamation of the President, which agent invested his money in cotton for him. This was clearly a violation of the statute and the proclamation above quoted, and was in violation of the common rules of international law. The result of which was that no title passed to Grossmeyer for the property purchased. He was prohibited from trading directly with the enemy, and could not do it indirectly. The agency which he established was itself void. This case however has no relevancy to the one at bar. Briggs established no agency inside of the Confederacy. He traded with no enemy, but with a citizen of the State of Kentucky. He did not agree to do anything which would in any way affect the status of the property which he bought, as far as the United States Government was concerned; its status was only affected after it became his by the act of Congress which agreed to restore him the proceeds.

In the case of Fernandez *v.* The United States (7 C. C., p. 541), reviewing all of the cases after the decision in the Kleine case, in speaking of the many decisions which had been rendered before that time in which the title of the United States to property which it should capture was so jealously guarded, the Court declared them no longer authority. The Court says :

"But all of these decisions rested upon the settled doc-
" trine of this Court, that, by capture under the Abandoned
" or Captured Property Act, the title of the property passed
" and became complete and indefeasible in the United
" States. That doctrine the Supreme Court has over-
" thrown by the recent decision in the Kleins case, and,
" on the contrary, has held that the property of the origi-
" nal owner is in no case absolutely divested.

"It follows that if the Government acquired no rights
" by capture, and, at the most, the mere duty of holding,
" guarding, and disposing of a fund in which it has no legal
" interest, then the jealous care which this Court extended
" to the supposed rights of the Government in property
" liable to capture was erroneous, and the earlier decisions
" do not apply to any transaction which, as between the
" parties themselves, would pass the title.

"In this case the transaction is not disaffirmed by the
" contracting parties; the consideration, though inade-
" quate, was valid; the property passed by delivery made
" through the transfer of the warehouse receipt, and we
" cannot say that the purchaser is not the owner."

This is manifestly the true doctrine and the proper standpoint from which to treat these cases. The net-proceeds of this property now in the Treasury is not the property of the United States and can never be without proceedings of confiscation and condemnation. These proceedings are so harsh and unjust that it is not expected they will ever be resorted to by this enlightened government. Even if it had the constitutional power, now that Morehead is dead, upon satisfactory proof that he was a traitor to forfeit his estate, it never had the power under the Constitution to forfeit for a longer term than during his own life. He now being dead there is no constitutional power to confiscate this property. It must be ultimately restored to somebody. It is a trust fund held by the Government for the benefit of the owner, and Briggs having proved him-

self the owner, and exhibited such a state of case as passed the title between himself and Morehead, there can be no further object in an investigation as to the question of title, except far enough to satisfy the trustee that the payment of the money is being made to the true *cest que trust.*

In Conrad *v.* Waples the Court declared the title passed, subject to the right of the United States to set it aside. So in this case the title passed to Briggs, and he is as clearly entitled to the money now in the Treasury as any other person is to his property in the hands of a trustee after the determination of the trust.

The right of one resident in loyal territory to sell property situated in the enemy's territory was recognized by this Court in the case of Montgomery *v.* The United States, 15 Wallace, 395.

Burbridge & Co. lived at New Orleans, and as factors and brokers had advanced money to Johnson, for which they had lien on the property situated in La Fourche Parish in the Confederate lines, where Johnson its owner was. They sold the crop to a citizen in New Orleans where they were, as agents for Johnson. The Court declared the sale as agents for Johnson void, but further said :

"They might have sold their lien, or the debt secured "by it, and had they done so the sale would have in- "volved no trading with the enemy."

Here is a clear specific declaration by this Court that they could sell their interest in property inside of the enemy's lines to another domiciled as they were at New Orleans, and such sale involved no trading with the enemy, and was valid.

Why not Morehead sell his interest to Briggs? He could and did do so, and it never involved any trading

with an enemy, or deprived the United States of any existing right at the time of sale, but conferred on Briggs the title to property out of which an important right grew from the act of 1863, and which was created for his benefit, and which his executor now ask be enforced.

It is submitted that the decision of lower Court should be reversed.

PHIL. B. THOMPSON, JR.,
Of Counsel for Appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1891.

JAMES A. BRIGGS, EXECUTOR OF C. M. Briggs, deceased, appellant,
vs.
THE UNITED STATES.
No. 722.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

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The jurisdiction of the Court of Claims over cases under the captured and abandoned property acts was revived in favor of the appellant by an act of Congress approved June 4, 1888 (p. 8).

The preliminary questions, under the act, of the loyalty of the claimant's testator and the *bona fides* of the assignment of the cotton having been determined favorably to the claimant, a considerable amount of testimony was taken on the merits of the claim.

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FINDINGS OF THE COURT.

The case presented by the findings (pp. 5–7) is substantially this: On April 18, 1862, Charles S. Morehead was, and had been for many years, a citizen of Kentucky, and owned at that time two plantations in Mississippi, near Egg's Point and Greenville.

He had been governor of Kentucky and, before the commencement of the war, was in partnership in the practice of law with C. M. Briggs, the appellant's testator.

After the commencement of the war and before April 18, 1862, Morehead was arrested as a rebel sympathizer and confined in Fort Warren for a considerable period, and until February, 1862, when he took the oath of allegiance and was released; but Charles M. Briggs was loyal to the United States throughout the war.

On April 18, 1862, Morehead executed and delivered to Charles M. Briggs the following instrument in writing:

> For and in consideration of money loaned and advanced heretofore by C. M. Briggs, and further valuable consideration by way of suretyship for me by said Briggs, I hereby sell and transfer to said C. M. Briggs all of the cotton on my two plantations in Mississippi, near Egg's Point and Greenville. Said cotton so sold embraces all that I have, baled and unbaled, gathered and ungathered. This is intended to cover all cotton that I have now or may have this year on said two plantations, supposed to be about 2,000 bales.
>
> C. S. MOREHEAD.
>
> APRIL 18, 1862.

When this instrument was executed and delivered *both parties were citizens and residents of Kentucky.* The instrument was founded on a valuable consideration and was bona fide between the parties.

Late in the spring or early in the summer of 1861, and

after the war began, Morehead, while a citizen of Kentucky, was, for a short time, at the plantations in Mississippi, where he left two agents in charge, who superintended the raising of cotton and had the general direction of affairs there in the years 1861, 1862, and 1863. "*The claimant's son*," who had charge of one of the plantations, sold cotton grown there during those years in order to raise the means to carry on planting operations. Some of these sales were made to the agent of the Confederate Government.

It does not appear whether or not Morehead gave any direction to his agents as to the disposition of the crops for said periods, nor whether he had any communication with them in the years 1862 and 1863.

All the cotton in question was raised after the execution of the said instrument and was seized by order of Gen. Grant in March, 1863, while stored in a place called "Wilson's Barn," in Mississippi.

There are other facts stated in the findings, but they do not appear to have any material bearing on the line of argument presented in support of the judgment below.

Upon this state of facts it was adjudged that the claimant's petition should be dismissed.

ARGUMENT.

Morehead was heavily indebted to C. M Briggs, who was also liable as his surety, and the assignment of cotton, dated April 18, 1862, was to secure and protect Briggs as the creditor and surety of Morehead.

We find that Briggs's son was in charge of one of the plantations in Mississippi referred to in the assignment, and this was, no doubt, a part of the arrangement with Morehead for the protection of Briggs.

ILLEGALITY OF THE CONTRACT.

Here, then, was a contract between two citizens of the United States, made within the Union lines and having for its basis the production of cotton on two plantations in Mississippi and within the Confederate lines.

Said this court in *Whitfield's Case* (92 U. S., 165, 170), "Cotton, as we have often said, was, during the late war, *as much hostile property as the military supplies and munitions of war it was used to obtain.*"

In *Lamar, executor,* v. *Browne* (92 U. S., 187, 194) the court said:

> It [cotton] was the foundation on which the hopes of the rebellion were built. It was substantially the only means which the insurgents had of securing influence abroad. In the hands of private owners it was subject to forced contributions in aid of the common cause. Its exportation through the blockade was a public necessity. Importing and exporting companies were formed for that purpose. It is not too much to say that the life of the Confederacy depended as much upon its cotton as it did upon its men. If they had had no cotton they would not have had, after the first year or two, the means to support war. To a very large extent it furnished the munitions of war and kept the forces in the field. It was, therefore, hostile property, and legitimately the subject of capture in the territory of the enemy.

If, then, Morehead had assigned to Briggs the profits of a powdermill he was operating in Mississippi, *it would have been no worse than the assignment of the cotton.*

It would seem clear, therefore, that the contract between Morehead and Briggs was fraught with danger to the public safety. Its direct effect was to give Briggs, a loyal

citizen, a deep interest in the production of "hostile property," which was, confessedly, the mainstay of the Confederacy, and "the foundation on which the hopes of the rebellion were built."

The question at once arises whether such a contract can be recognized or enforced in a court sworn to support the Constitution of the United States.

It is to be remembered that everything in enemy territory is impressed with a hostile character, because it forms part of the enemy's resources, for it may, at any time, be pressed into his service, and is, therefore, potentially his. *Mrs. Alexander's Cotton* (2 Wall., 404, 419). *The William Bagaley* (5 Wall., 377, 409).

Both Morehead and Briggs were, consequently, directly interested in contributing to the resources of the enemy.

Is authority necessary to sustain the proposition that no action will lie to enforce a contract, springing *ex turpi causa?*

In *Sprott* v. *United States* (20 Wall., 459, 463), this court used the following language, which is opposite to this case:

> That any person owing allegiance to an organized government can make a contract by which, for the sake of gain, he contributes most substantially and knowingly to the vital necessities of a treasonable conspiracy against its existence, and then in a court of that government base successfully his rights on such a transaction, is opposed to all that we have learned of the invalidity of immoral contracts. A clearer case of turpitude in the consideration of a contract can hardly be imagined unless treason be taken out of the catalogue of crimes.

II.

It is enough to stamp this contract with illegality that it had *a tendency* to cause, and no doubt did cause, unlawful communication with the enemy.

To withdraw the temptation to do wrong, the law stamps as illegal every contract that has a tendency even to produce a public mischief.

The rule could not be more strongly stated than by Mr. Justice Miller in *Sprott* v. *United States* (20 Wall., 459, 463), namely:

> The proposition that there is in many cases a public policy which forbids courts of justice to allow any validity to contracts because of their *tendency* to affect injuriously the highest public interests, and to undermine or destroy the safeguards of the social fabric, *is too well settled to admit of dispute.*

In *Tool Company* v. *Norris* (2 Wall., 45, 54, 55), this court held that an agreement to procure a contract from the Government to furnish its supplies could not be enforced in the courts because of its *tendency* "to introduce personal solicitation and personal influence as elements in the procurement of contracts."

To the same effect are the cases of *Marshall* v. *Baltimore and Ohio Railroad Company* (16 How., 314); *Trist* v. *Child* (21 Wall., 441); *Meguire* v. *Corwine* (101 U. S., 108); *Oscanyan* v. *Arms Company* (103 U. S., 261); *Anderson* v. *Carkins* (135 U. S., 483).

Contracts to insure seamen's wages, to procure offices, to procure marriages, contracts not to marry, contracts compounding felonies, contracts between husband and wife contemplating a future separation, contracts in re-

straint of trade, contracts violating the rule against perpetuities, contracts insuring an enemy's ships or cargoes, and, in some cases, contracts between a trustee and his *cestui que trust*, and, to cut the matter short, many other contracts are held void because of "*their tendency to produce a public mischief or inconvenience*," to borrow the words of Lord Ellenborough in *Gilbert* v. *Sykes* (16 East., 156).

In the great Bridgewater Case (*Egerton* v. *Earl Brownlow*, 4 Ho. Lds. Cases 1) there is perhaps the greatest and fullest discussion of the subject of contracts void on grounds of public policy to be found anywhere.

The Duke of Bridgewater by his will gave an immense landed property to Lord Alford in tail male, and coupled with the devise this condition:

> *Provided always*, and I declare my will to be, that if the said John Hume Lord Viscount Alford shall die *without having acquired the title and dignity of Duke or Marquis of Bridgewater* to him and the heirs male of his body, then and in such case the use and estates hereinbefore directed to be limited to the heirs male of his body *shall cease and be absolutely void.*

The two great questions in the case were, whether the acquisition of the title of Duke or Marquis of Bridgewater was a condition precedent or subsequent, and whether the condition was valid.

The House of Lords held that the acquisition of the title was a condition subsequent; and, furthermore, that the condition was void because of the inducement it held out to Lord Alford "to use the means of unduly influencing the dispensers of royal favor." The court said it was enough that the condition had a *tendency* to pro-

duce a public evil, and that the improbability of the mischief happening was not to be considered, Lord Brougham remarking that:

> We are not, therefore, allowed to say that the party should not be presumed to seek the honor by undue means, or the dispensers of the royal favor to grant it for reasons other than his merits. It is very possible that neither the one nor the other blame may be incurred; that neither the individual nor the minister may swerve from the line of their duty; it is even far from probable that either will; BUT THE LAW REGARDS POSSIBLE EVENTS NOT MORE UNLIKELY THAN THESE; *and taking security against the infirmity of human nature,* REGARDS THE TENDENCY AS WELL AS THE ACT, *and removes the motives to offending, that it may not have to punish the offense* (pp. 178, 179).

Lord St. Leonards, referring to the case of *Dimes* v. *The Grand Junction Canal* (3 H. L. Cas. 759), said:

> And your Lordships have shown by your decision in a case that was decided lately by the House, that a judge with the smallest interest was incapable of trying a cause, *not because anybody supposed that he would be influenced* (nobody supposed so), but because the principle is that a man shall not have an interest in a matter which he is to decide. *You must take the general principle* (p. 240).

To say then that the contract between Morehead and Briggs *had no tendency* to cause illegal communication with the enemy territory would be to advance a very absurd proposition and to offend common sense.

Briggs was deeply interested *in the cotton that was to be grown*, and his son had charge of one of the plantations, and when that is stated, enough seems to be stated to avoid the contract. That Briggs should be interested in the production of a crop of cotton in the enemy's country without feeling the temptation to communicate with those having his interests in charge there is hardly possible.

It is entirely mistaken to say that it was "*commercial intercourse*" alone that was prohibited during the late war. Intercourse of any kind between enemies, not under the

eyes of the belligerents, is universally declared to be of pernicious tendency, and is inconsistent with a state of war.

In the case *The Rapid* (8 Cr., 155, 161) this court used the following energetic language:

> In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent States, exist, as to each other, in a state of utter occlusion. If they meet it is only in combat.
>
> War strips man of his social nature; it demands of him the suppression of those sympathies which claim man for a brother; and accustoms the ear of humanity to hear with indifference, perhaps exultation, "that thousands have been slain."
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> On the subject which particularly affects this case there has been no general relaxation. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. *Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because the enemy of his country.* It is not necessary to quote the authorities on this subject; they are numerous, explicit, respectable, and have been ably commented upon in the argument.

Were it necessary to do so, it would be easy to demonstrate from the face of the contract between Morehead and Briggs that the intercourse with the enemy territory which the contract tended to bring about was "commercial" in character. But it would be a waste of time to do so, as all unlicensed intercourse, whatever its character, was prohibited by the mere fact of war.

Referring the court to the opinion of the learned chief justice of the Court of Claims (pp. 7–14), we respectfully submit that the judgment should be affirmed.

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